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Constitutions and Statutes

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 355

INTERNATIONAL HARVESTER COMPANY AND INTERNATIONAL HARVESTER COMPANY OF AMERICA,

Appellants,

vs.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON, AND FRANK G. THOMPSON, AS MEMBERS OF AND CONSTITUTING THE BOARD OF DEPARTMENT OF TREASURY.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA.

STATEMENT AS TO JURISDICTION.

Pursuant to the provisions of Rule No. 12 of the Supreme Court of the United States, Appellants file this Statement, showing that this Court has jurisdiction upon appeal to review the judgment in question.

This is an appeal from the judgment of the Supreme Court of Indiana in the cause of Department of Treasury of the State of Indiana, et al., Appellants, *vs.* International

Harvester Company, Appellee, reported in 47 N. E. (2) 150, wherein the Supreme Court of Indiana affirmed in part and reversed in part the judgment of Marion Superior Court, Room 3, in the cause wherein the International Harvester Company and International Harvester Company of America, as plaintiffs, brought suit to recover Indiana Gross Income Taxes paid by them on certain classes of sales fully described in the complaint therein. No opinion was delivered by the Superior Court. A copy of the opinion delivered by the Supreme Court of Indiana is appended hereto, as Appendix A.

Basis of Jurisdiction.

Section 237 of the Judicial Code (28 U. S. C. 344) gives jurisdiction for this appeal. It provides that a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court by writ of error. By Act of January 31, 1928, Chapter 14, Section 1 (28 U. S. C. 861a) the remedy by appeal has been substituted for writ of error in such cases.

The State Statute Involved.

The statute of the State of Indiana, the validity of which as applied to the Appellants herein is involved, is Chapter 50, Acts of 1933, State of Indiana, page 388, known as the Indiana Gross Income Tax Act of 1933. Section 2 of the Act of 1933, as in effect in the years 1935 and 1936 for which the taxes involved in this appeal were paid, provides as follows:

> "Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the

> amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

The Indiana Gross Income Tax Act of 1933 levied the above tax on gross income at varying rates of tax for various classes of gross income. By Section 3 of the Act the tax on gross receipts from wholesale sales was made ¼ of 1% and the tax on gross receipts from retail sales was levied at 1%. Wholesale sales are sales for resale. Retail sales are sales to the consumer, *Storen* v. *J. D. Adams Mfg. Co.*, 212 Ind. 343, 7 N. E. 2nd 941.

The Act makes no provision for the apportionment of gross receipts as respects gross receipts derived from sources partly within and partly without the State of Indiana.

Under Section 6 of the Act it is provided that "There shall be excepted from the gross income taxable under this Act:

> "(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America. * * *"

Section 12 of the Act provides that relief against the assessment of tax thereunder may be had by payment of the tax and suit for refund thereof, which was the procedure followed in this case.

Date of Judgment Sought to Be Reviewed and Date of Presentation of Application for Review.

The date of the final decision and judgment in the Supreme Court of Indiana sought to be reviewed is May 11, 1943.

The original judgment and decision of the Supreme Court of Indiana was rendered on March 19, 1943.

Both Appellants below (Department of Treasury, et al.) and Appellees below (International Harvester Company, et al.) filed petitions for rehearing with the Supreme Court of Indiana. Both petitions for rehearing were denied by the Supreme Court of Indiana on May 11, 1943 (R. 186). The petition for appeal was presented to and allowed by Hon. H. Nathan Swaim, Chief Justice of the Supreme Court of Indiana on August 9, 1943.

Finality of Judgment.

The Supreme Court of Indiana is the highest court in the State of Indiana, and on its denial of the petitions for rehearing its judgment became final. Under the Constitution of Indiana, the Supreme Court of Indiana is the court of last resort in the state. (Constitution of the State of Indiana, Article 7, Section 1) *Curless* v. *Watson,* 180 Ind. 86.

The United States Supreme Court has held that the date from which the time for making application for appeal begins to run is the date, if a petition for rehearing is filed, when the petition for rehearing is denied. *Citizens Bank of Michigan City, Indiana* v. *Opperman,* 249 U. S. 448, 449.

Nature of the Case.

This appeal involves receipts from three classes of sales on which Indiana Gross Income Taxes were paid by the International Harvester Company and International Harvester Company of America for the years 1935 and 1936, the recovery of which taxes was denied by the Supreme Court of Indiana by its decision in this case.

The International Harvester Company is a New Jersey corporation with general offices in Chicago, Illinois (R. 43). The International Harvester Company of America was a Wisconsin corporation, all the capital stock of which was owned by the International Harvester Company, the parent company (R. 43). In 1935 the International Harvester Company of America marketed in Indiana the products manufactured by the International Harvester Company (R. 44). In 1936 the International Harvester Company marketed its own products directly, and the International Harvester Company of America has since been dissolved (R. 44). By stipulation of the parties, it was agreed that the International Harvester Company should be treated as the sole plaintiff in this action (R. 44).

All the sales of the International Harvester Company are made through its selling branches. No sales are made by the factories. The sales are made by the branches on orders received by the branches by mail, or solicited by their salesmen. All orders are subject to approval and acceptance by the Company's branch manager of the branch making the sale. The goods are shipped to the buyer from the branch house or the factory or a general transfer warehouse of the Company. The general transfer warehouses of the Company are all located outside the State of Indiana, namely at Chicago and Moline, Illinois, Kansas City, Council Bluffs and St. Paul (R. 48).

The International Harvester Company had in 1935 and 1936 factories in Illinois, Ohio, Tennessee, New York, Wis-

consin and Louisiana and two factories in Indiana, one at Fort Wayne, manufacturing motor trucks, and one at Richmond, manufacturing seeding machines and small tillage implements. It had more than 100 selling branches in the United States. Four of these selling branches were in Indiana, at Indianapolis, Fort Wayne, Terre Haute and Evansville, which sold to dealers and consumers in their trade areas, including parts of Indiana and parts of Ohio, Illinois and Kentucky. It had a motor truck branch in Chicago selling in the Chicago trade area, including the North half of Lake County, Indiana, and general branches at Kankakee, Illinois, Louisville, Kentucky, and Cincinnati, Ohio, selling to buyers and consumers in the states where they were located and also to dealers and consumers located in certain parts of Indiana (R. 47-54).

The branch house areas have been established for many years and long before the Indiana Gross Income Tax was enacted in 1933. The branch houses at Fort Wayne, Indianapolis, Terre Haute, Evansville and Cincinnati have been located at the above places since November 1, 1902. The branch house at Kankakee has been located there since November 1, 1903. The Louisville branch house was originally located there on November 1, 1902, but it was moved across the Ohio River to New Albany, Indiana, on October 12, 1911, and then back to Louisville on December 1, 1922, where it has since remained. The Chicago Motor Truck Branch was established January 1, 1917 (R. 55-56).

The branch house at Cincinnati for many years has served a trade area consisting of territory in southwestern Ohio, northeastern Kentucky and southeastern Indiana. The branch at Kankakee has handled a trade area consisting of territory along both sides of the state line, in Illinois and Indiana. The branch at Fort Wayne has handled a trade area consisting of territory in northeastern Indiana

and in Ohio along the Indiana-Ohio border. The branch at Evansville has handled territory in the tristate trade area in nearby Kentucky, Illinois and Indiana. The branch at Louisville has served the trade area in nearby Indiana and Kentucky (R. 48-50).

Evidence was introduced showing that other wholesale businesses operating in Indiana, Ohio, Kentucky and Illinois have trade areas overlapping state lines; that Louisville is the commercial center of a trade area extending into Indiana and Kentucky; that Cincinnati is the center of a trade area extending into Ohio, Kentucky and Indiana; that Evansville is the center of a trade area including parts of Indiana, Kentucky and Illinois; that Terre Haute is the center of a trade area including parts of Indiana and Illinois; Fort Wayne is the center of a trade area including parts of northeastern Indiana and Western Ohio, and that northwestern Indiana is in a trade area including part of northeastern Illinois (R. 110-114).

The Complaint as filed sought recovery of taxes paid on six classes of sales designated as Classes A, B, C, D, E and F, but in the course of the litigation the Department of Treasury conceded the nontaxability of gross receipts from the shipments in carload lots in Classes A (R. 71) and E (R. 76) and conceded all of Class B (R. 72-73). The International Harvester Company conceded the taxability of sales in Class F (R. 78).

The trial court by its judgment entered April 29, 1942, held that the Appellants were not entitled to recover any of the taxes paid on the remaining sales in Class E, but that Appellants were entitled to recover taxes on receipts from sales in Classes A, C and D, and it rendered judgment accordingly (R. 32-34).[1]

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[1] The copy of the judgment of the trial court reproduced in the Record (pp. 31-35) erroneously states as the finding of the trial court that Appellants should recover the tax paid on receipts from "*retail* sales in Classes

The Supreme Court of Indiana affirmed the judgment of the trial court in Appellants' favor as to Class A, affirmed the trial court's judgment against Appellants as to Class E, reversed the trial court's judgment in Appellants' favor as to Classes C and D, and directed the trial court to render judgment as indicated by the Supreme Court opinion. The Court's opinion stated that the transactions in Classes C, D and E were subject to the Indiana Gross Income Tax because "Neither of these classes present a possibility of double taxation, since no other state could impose such a burden in view of the conclusions reached in the J. D. Adams case."

Therefore, the three classes involved in this appeal are as follows:

Class C. Sales by branches located outside of Indiana, namely at Kankakee, Louisville and Cincinnati, and Chicago Motor Truck Branch, to dealers and consumers residing in Indiana, who went to the factory in Indiana, and there took delivery and possession of the purchased goods and transported the goods to their places of business or residence in Indiana. The goods were principally motor trucks manufactured at the Fort Wayne works and a small amount of seeding machines and tillage implements manufactured by the Richmond works (R. 73).

Class D. Sales by branches located in Indiana, namely at Evansville, Fort Wayne and Terre Haute, to dealers and consumers residing outside Indiana, who came to Indiana and took delivery of the purchased goods in Indiana and transported the goods back to their places of business or residence in Kentucky, Illinois or Ohio (R. 74).

A, C and D". The word "retail" did not so appear in the trial court's judgment. This error in the Record is inconsequential, however, because it elsewhere repeatedly appears in the Record that tax on both wholesale and retail sales was involved as to both of the now remaining Classes C and D, e. g. see Stipulation of Facts filed with the trial court, Record, pp. 73-75.

Class E. Sales by branches in Indiana to dealers and consumers in Indiana of goods shipped by Appellant from outside the State of Indiana to buyers in the State of Indiana pursuant to orders or contracts of sale specifying that shipment would be so made. The goods in Class E were manufactured outside Indiana (R. 75-76). There was evidence showing that the shipments were so made either because the branch house in Indiana did not have the article in stock or because the freight rate direct from the factory or transfer house to the buyer in Indiana would be less than the combined freight rate originally from the factory or transfer house to the branch and then from the branch to the buyer (R. 146-147, 128-134).

The Federal Questions Involved Are Substantial.

The questions directly involved in this appeal are whether the Indiana Gross Income Tax on gross receipts of International Harvester in said Classes C, D and E are constitutional under the Commerce Clause of the United States Constitution and under the Due Process Clause of the Fourteenth Amendment.

In the case of *J. D. Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, the United States Supreme Court held that the Indiana Gross Income Tax could not be levied on gross receipts of the J. D. Adams Mfg. Co., the seller located in Indiana, from sales to buyers in other states or foreign countries, and condemned the Indiana Gross Income Tax as applied to sales in interstate commerce, saying:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manu-

factured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by article 1, section 8, of the Constitution." 304 U. S. 307, 311.

Then in the case of *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, the United States Supreme Court upheld the New York City Sales Tax on sales by the Berwind-White Coal Mining Co. to purchasers in New York City. The Court distinguished the *Berwind-White* case from the *Adams* case, saying "The rationale of the Adams Mfg. Co. case does not call for condemnation of the present tax. Here the tax is conditioned upon a local activity delivery of goods within the State upon their purchase for consumption." The Indiana tax is not so conditioned and by the rationale of the *Adams* case cannot be imposed on sales in Classes C, D and E.

On the same day the United States Supreme Court decided the cases of *McGoldrick* v. *Felt & Tarrant Mfg. Co.* and *McGoldrick* v. *A. H. DuGrenier, Inc.*, 309 U. S. 70, stating that the decision in both said cases is controlled "by our decision in the *Berwind-White* case."

The Court said that the New York City Sales Tax in both cases "was imposed on all the sales of merchandise for which orders were taken within the city and possession of which was transferred to the purchaser there."

This was the same tax upheld in the *Berwind-White* case as conditioned upon a local activity and expressly distinguished there from the Indiana Gross Income Tax.

In *Allied Mills, Inc.*, v. *Department of Treasury*, 87 L. Ed. 514, 63 S. Ct. 666, the United States Supreme Court in a *per curiam* opinion affirmed the judgment of the Supreme Court of Indiana citing the above case of *McGoldrick* v. *Felt*

& Tarrant Mfg. Co., 309 U. S. 70, and also the case of *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62, which was a case under the California Use Tax.

The case of Allied Mills, Inc., was the reverse of the *Adams* case. In the *Allied Mills* case the sales of livestock feeds were made by Allied Mills, an Indiana corporation, to buyers in Indiana on contracts approved by factory branches of Allied Mills in Illinois and the feeds were shipped from those factory branches to the buyers in Indiana.

The Supreme Court of Indiana in this case, *Department of Treasury, et al.* vs. *International Harvester Company, et al.*, affirmed the tax on the Appellants herein on Classes C, D and E on the authority of the above case of *Allied Mills, Inc.* v. *Department of Treasury, supra,* stating that when the *Allied Mills* case (42 N. E. (2d) 34) was before the Supreme Court of Indiana, "we interpreted the *Adams* case as meaning that the tax may be levied by the buyer's state regardless of the incidental interstate nature of the transaction. This view was sustained by the Supreme Court. *Allied Mills, Inc.* v. *Department of Treasury.*"

The Supreme Court of Indiana therefore interprets the *per curiam* opinion of the United States Supreme Court in the *Allied Mills* case as meaning that the state of the buyer may levy the Indiana Gross Income Tax on receipts on sales by the seller in another state, although the *ratio decidendi* of the decision in the *Adams* case denied the right of the state of the seller to levy the Indiana Gross Income Tax on gross receipts from interstate commerce transactions, and the rationale of that decision denied the right of any state to levy a tax of that character on receipts from interstate sales.

The state court's conclusion is that the state of the buyer may lay such a tax and the inference is that only the state of the buyer may tax. We submit that both the con-

clusion that the state of the buyer may tax and the inference that it is the only state that may tax, are unauthorized by the decisions of the United States Supreme Court.

It is obvious that this theory is squarely opposed to the rule laid down in the *Adams* case which was re-affirmed by the Court in *McGoldrick* v. *Berwind-White Coal Mining Co., supra.* The principle was stated again in *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 435, where the Court adverted to the maxim that "even interstate business must pay its way" but said that it was enough for the purposes of that case that "in the absence of Congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state". Such a tax, the Court said, "at least when not apportioned to the activities carried on within the State" burdens the commerce "in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce, and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject" (pp. 438-9).

Therefore we do not understand that the *Adams* case means in the words of the Supreme Court of Indiana, "that the tax may be levied by the buyer's state regardless of the incidental interstate nature of the transaction". We understand rather that the United States Supreme Court held in the *Adams* case and in the *Gwin, White & Prince* case that because the transaction was such that if the state of the seller could tax then the state of the buyer, the state of manufacture, the state of approval of the contract and receipt of the sale proceeds and other states which the commerce touches could also tax the entire proceeds with-

out apportionment, and therefore that there was consequently a danger of multiple taxation and no state could tax the entire gross receipts from such a transaction.

The cases cited by the United States Supreme Court in its *per curiam* opinion in *Allied Mills, Inc.* v. *Department of Treasury, supra,* namely, *McGoldrick* v. *Felt & Tarrant Mfg. Co.,* 309 U. S. 70 and *Felt & Tarrant Mfg. Co.* v. *Gallagher,* 306 U. S. 62, do not apply in this case.

McGoldrick v. *Felt & Tarrant Mfg. Co., supra,* was a tax under the New York City Sales Tax, but that tax was laid on the buyer, was conditioned on local activity and is entirely different from the Indiana Gross Income Tax. The taxable event under the New York City tax could occur only once and only in one jurisdiction. The Indiana tax on the other hand is a tax not on the buyer but on the seller on gross receipts from all sources, on gross receipts from dividends, rent, interest, salaries, wages, profits of all kinds and includes receipts not only from retail sales, where the sale is to the buyer for consumption, but also gross receipts from wholesale sales where the goods do not come to rest in the hands of the consumer, but are to be resold by the dealer and where there is a manifest possibility of multiple taxation. Every state which the interstate sale touches and which has a valid basis under the due process clause for asserting that gross receipts from the sale have a source, even in part, with the state may, except for the commerce clause, impose and repeatedly impose a gross receipts tax on the interstate sale. That is the "vice" of the Indiana tax which the commerce clause condemns, but which is not present in the New York City tax.

Felt & Tarrant Mfg. Co. v. *Gallagher,* 306 U. S. 62, was a tax under the California Use Tax, a tax on the consumer.

THE FEDERAL QUESTIONS IN CLASS C SALES ARE SUBSTANTIAL.

The point was raised below in this case that there was no transportation across state lines in Class C transactions. The goods were at a factory in Indiana and were picked up there by the buyer in Indiana. The branch which made the sale was in Ohio, Kentucky or Illinois. The branch outside of Indiana accepted the order and directed the factory to deliver the goods to the buyer when he called for them. The branch outside of Indiana received the entire sales proceeds.

In Class C sales it is submitted that the interstate transaction is unbroken from the time a contract is made by a sales branch at Cincinnati, Louisville or Kankakee with a buyer in Indiana until the motor truck or seeding machine reaches the buyer's home town in Indiana. The transaction which started with a contract made in Ohio, Kentucky or Illinois is not completed until the goods come to rest at the buyer's home town in Indiana.

From the day of *Gibbons* v. *Ogden,* 9 Wheaton 1, it has been recognized, in the words of Chief Justice Marshall, that commerce is "undoubtedly traffic but it is something more, it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches and is regulated by prescribing rules for carrying on that intercourse."

It has been held that the transmission of telegrams, of telephone messages, of radio messages are transactions in interstate commerce.

> *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.,* 96 U. S. 1;
> *Fishers Blend Station, Inc.* v. *State Tax Com.* 297 U. S. 650;
> *Newfield* v. *Ryan,* 91 Fed. (2d) 700, Certiorari denied 302 U. S. 729, Rehearing denied 302 U. S. 777;

Cooney v. Mountain States Telephone & Telegraph Co., 294 U. S. 284.

In Class C there is every interstate feature present except that to save transportation charges on shipment from the out-of-state branch, the buyer obtained the goods at the factory in Indiana and there is no actual shipment across a state line. Under the decisions last cited the transaction is nevertheless an interstate sale of goods.

In Class C then there is an interstate sale between the seller outside Indiana to the buyer inside Indiana. Whereas in the *Adams* case the seller's state sought to levy the tax, here Indiana is the buyer's state and seeks to lay the tax. The Court said in the *Adams* case that the seller's state could not tax because to permit it to lay a tax of the character of the Indiana Cross Income Tax, would also require that the buyer's state could lay such a tax. The rationale of the *Adams* case was that neither the seller's state nor the buyer's state could levy a tax of the character of the Indiana Gross Income Tax. Therefore, there is the question under the Commerce Clause whether the state of the buyer may levy the Indiana Gross Income Tax on the sales in Class C. Further, under the Due Process Clause of the Fourteenth Amendment, there is the question whether the entire proceeds of the sales in Class C may be taxed by Indiana, the buyer's state. In the Class C sales the seller is outside of Indiana, the contract of sale is approved and accepted outside of Indiana, so that the contract is made outside of Indiana, and the seller receives the price of the goods sold outside of Indiana. The proceeds of sales in Class C are therefore in material part derived from sources outside of Indiana, yet Indiana seeks to tax the entire proceeds of Class C sales and does not limit the tax to that part of the proceeds derived from Indiana sources. The statute makes no provision for an apportionment of any

kind or upon any basis, and the taxpayer is therefore given no opportunity to make any apportionment and to pay tax only upon that part of the proceeds of Class C sales which are derived from Indiana sources. This violation of the Due Process Clause of the Fourteenth Amendment also presents a substantial Federal question.

THE FEDERAL QUESTIONS IN CLASS D SALES ARE SUBSTANTIAL.

The Supreme Court of Indiana interpreted the United States Supreme Court's opinion in the *Allied Mills* case as holding that the state of the buyer can tax. But the state of the buyer in Class D is not Indiana. In Class D the buyer is in Ohio, Kentucky or Illinois and comes to Indiana to get his truck or farm implement at an office of the International Harvester Company in Indiana, gets delivery in Indiana, and takes the goods back to his place of business or home in Ohio, Kentucky or Illinois. Indiana is not the buyer's state but is the state where delivery was made.

Consequently, if the state of the buyer can tax, namely, Ohio, Kentucky or Illinois, and if the state of delivery, Indiana, can also tax, as held in this case by the Supreme Court of Indiana, then there is definitely the possibility of double taxation which is exactly what the Court said in the *Adams* case would render the tax an invalid burden on interstate commerce.

The possibility of multiple taxation as applied to a gross receipts tax on interstate sales is strikingly presented by the case of these drive-away deliveries, namely, where the buyer takes delivery in one state and transports the article himself to his own home or place of business in his own state. Thus, in *Commissioner of Corporations & Taxation v. Ford Motor Company,* 308 Mass. 558, 33 N. E. (2d) 318, Ford Motor Company delivered automobiles to its out of state dealers who drove them to their "respective districts all of which were beyond the boundaries of this common-

wealth." The Court held that these sales were sales in interstate commerce and could not be included in the measure of the Massachusetts excise tax.

It is clear that the New York City Sales Tax cases have no bearing on the tax in Class D sales. In the *New York City* cases the place of delivery and the location of the buyer were both in New York City, but in the case of drive-away deliveries the delivery is made in one state and the buyer is located in a second state and it is possible that the seller's office where the proceeds of the sale are received may be in a third state. Which of these states and how many of them shall be permitted to lay a gross receipts tax on the one transaction?

It is also obvious that the case of *Allied Mills, Inc.* v. *Department of Treasury, supra,* has no bearing on the tax on Class D sales. The tax in the *Allied Mills* case was levied by the state of the buyer. In Class D the tax is levied by the state of delivery and the state of the buyer is in Ohio, Kentucky or Illinois.

Moreover, as respects sales to Ohio users included in Class D, Ohio now has in effect a Use Tax levied "On the storage, use, or other consumption in this state of tangible personal property purchased on or after the first day of January, 1936, for storage, use, or other consumption in this state," with certain exceptions, among which is property on the sale of which the Ohio Sales Tax has been paid. General Code of Ohio, Section 5546-26.

In the case of *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, Mr. Justice Cardozo said, on page 587, that if there were limits to the power of the state as a self-contained unit to "frame its own system of burdens and exemptions without heeding systems elsewhere" there is "no need to mark them now. It will be time enough to mark them when a taxpayer paying in the state of origin is compelled to pay

again in the state of destination. This statute by its framework avoids that possibility."

The Supreme Court of Indiana has sustained a tax by Indiana, the state of delivery on the sale at retail in Class D to an Ohio buyer, and the Ohio use tax levies a tax on the use in Ohio of an article bought in Indiana and brought into Ohio by the Ohio buyer.

Therefore as to Class D sales we submit that the question is substantial first because the court bases its decision on the ground that the state of the buyer can lay a gross receipts tax on proceeds from an interstate transaction whereas the state of Indiana as to Class D is not the state of the buyer but the state of delivery. Secondly, if both the state of the buyer and the state of delivery can tax there is manifestly double taxation. Possibility of double and even multiple taxation in such cases as Class D sales is wide open. Thirdly, the Ohio Use Tax is levied on the use of an article purchased at retail in Indiana in Class D and yet the Supreme Court of Indiana has held that the Indiana Gross Income Tax may be levied on gross receipts from retail sales in Class D.

In Class D sales therefore the seller is in Indiana and the buyer is outside Indiana, the same as in the *Adams* case, except that here the buyer comes to Indiana, receives the goods and provides the transportation of the goods from Indiana to the buyer's place of business or residence outside Indiana. It would appear utterly immaterial, of course, whether the seller, or the buyer or an independent carrier performs the transportation; the interstate character of the transaction remains the same. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282. There is therefore the substantial Federal question whether the tax on Class D sales is invalidated by the decision in the *Adams* case. If the tax is not thus prohibited, and if it is true that the Court has approved the alleged validity of a gross receipts

tax imposed by the buyer's state, then there is the further substantial Federal question whether the buyer's state is the state where the buyer maintains his place of business or residence and where the economic competition in the market place occurs, or is the state where the buyer takes delivery of the goods. That a substantial Federal question is present in Class D sales is most clearly shown by the conflict of decisions in the state courts. Massachusetts and California have denied the validity of a tax on the proceeds of Class D sales. *Commissioner* vs. *Ford Motor Co.*, 308 Mass. 558, 33 N. E. (2d) 318; *Standard Oil Co.* vs. *Johnson*, 33 Cal. App. (2d) 430, 92 Pacific (2d) 470. The Indiana Supreme Court in the instant case has upheld the validity of the tax on Class D sales. Further, there is a substantial Federal question under the Due Process Clause of the Fourteenth Amendment in that the taxing Act permits no apportionment of taxable gross receipts between that part of the receipts having a source in Indiana and that part having a source outside Indiana. In Class D sales the buyer from whom the purchase price emanates is outside Indiana and is in large part the source of the purchase price. Moreover, the tax is on the privilege of receiving gross income and as respects a buyer in another state, that right may be effectively exercised and legally enforced only in the buyer's state outside Indiana. Under the Due Process Clause, can Indiana constitutionally tax the exercise of a privilege which is effectively granted and can be legally enforced only in another state?

The Federal Questions in Class E Sales Are Substantial.

In Class E sales the seller and buyer are both in Indiana, but the goods are obtained outside Indiana and are shipped interstate to the buyer in Indiana pursuant to a contract requiring such shipment. In *Sonneborn Bros.* vs. *Cureton*, 262 U. S. 506, the Court held that this kind of transaction

was interstate and under the Commerce Clause could not be taxed. The proceeds of Class E sales are therefore exempt from the Indiana tax unless the *Sonneborn* case has been overruled, but the Court has not overruled the *Sonneborn* case. There is therefore the substantial Federal question whether the tax on the proceeds of Class E sales is an invalid burden under the Commerce Clause. Further, the goods sold in Class E were manufactured outside Indiana, and in large part the proceeds of sale were derived from the place of manufacture outside Indiana. However, the Indiana Act, as construed by the Indiana Supreme Court, lays a tax on the full proceeds of sale, without apportionment to that part of the proceeds having an Indiana source, and the Act permits no such apportionment of the proceeds of sale. Therefore, there is the further substantial Federal question whether the tax on Class E violates the Due Process Clause of the Fourteenth Amendment.

The Manner in Which the Federal Questions Were Raised.

The Federal questions involved in this case were raised by the Appellants in their Complaint in the Marion Superior Court and on their appeal to the Supreme Court of Indiana. In their Complaint Appellants herein alleged that the taxes on the transactions described in Classes A, B, C, D, E and F were taxes on gross receipts derived from business conducted in commerce between the states, and that if the Gross Income Tax Act were construed to impose a tax on gross receipts of the Plaintiffs "derived from their business conducted as described in Classes A, B, C, D, E and F, then said Act is invalid and void for the reason that such tax constitutes a regulation of, and a burden upon, interstate commerce and is in violation of Section 8, Article 1, of the Constitution of the United States" (R. pp. 24-25).

Appellants also alleged in the Complaint that if the Gross Income Tax Act, considered according to its true

intent, imposes a tax on gross receipts of the Plaintiffs derived from sources from their business as described in Classes A, B, C, D, E and F, "then said Act is invalid and void for the reason that the State of Indiana has no jurisdiction to impose a tax upon such gross receipts, and the levy of such tax is lacking in due process of law and is in violation of the Fourteenth Amendment of the Constitution of the United States" (R. p. 25). The Complaint also contended that the taxes in Classes A, B, C, D, E and F were levied on the entire gross receipts from such sales, and that the State of Indiana did not segregate or seek to limit the tax to the activities carried on within the State, and that if said Gross Income Tax Act when construed according to its true intent "imposes a tax upon said entire gross receipts, derived from the business conducted as described in Classes A, B, C, D, E and F, then said Act is invalid and void for the reason that the State of Indiana has no jurisdiction to impose a tax upon such gross receipts, and the levy of such tax is lacking in due process of law and is in violation of the Fourteenth Amendment of the Constitution of the United States" (R. pp. 25-26).

The trial court held for Appellants, that the receipts from sales in Classes A, C and D were not subject to the Indiana Gross Income Tax, and against Appellants, that the receipts in Class E from sales filled by shipments in less than carload lots were subject to the Indiana Gross Income Tax (R. pp. 31-35).

While the trial court rendered no opinion and stated no special findings of fact or conclusions of law, its decision necessarily held either (1) that the receipts from sales in Classes C and D were in interstate commerce, and that a tax on them was an invalid burden on the commerce, or (2) that the tax on Classes C and D was lacking in due process of law and was void under the Fourteenth Amendment; and also necessarily held that the tax on sales in Class E was

neither a burden on interstate commerce nor lacking in due process of law.

In the Appellants' brief in the Indiana Supreme Court (there designated Appellees' Brief), the same constitutional questions were raised as to the tax on Classes C, D and E.

Proposition II of said brief was as follows:

> "A tax on Class C sales would be a burden on transactions in interstate commerce forbidden by the Commerce Clause" (R. p. 165).

Proposition III of said brief was as follows:

> "A tax on Class D sales would be a burden on transactions in interstate commerce forbidden by the Commerce Clause" (R. p. 165).

Proposition IV of said brief was as follows:

> "Class E sales are sales in interstate commerce and to levy a gross income tax on gross receipts therefrom would be to cast an unconstitutional burden on interstate commerce" (R. p. 165).

Proposition V of said brief was as follows:

> "A tax on Appellees' gross receipts from sales in Classes A, C, D or E would be a tax on property and business located outside the State of Indiana and would be in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States" (R. p. 165).

The Supreme Court of Indiana held that applying to this case its decision and the decision of this Court in the *Allied Mills* case, "it seems clear that transactions under Classes C, D and E are subject to our Gross Income Tax. Neither of these classes present a possibility of double taxation, since no other State could impose such a burden in view of the conclusions reached in the *J. D. Adams* case."

Cases Believed to Sustain Jurisdiction.

Appellants believe that the following cases sustain the jurisdiction of this Court.

J. D. Adams Mfg. Co. v. *Storen*, 304 U. S. 307;
Gwin, White & Prince, Inc. v. *Henneford*, 305 U. S. 304;
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282;
Fisher's Blend Station v. *Tax Commission*, 297 U. S. 650;
Hans Rees Sons v. *North Carolina*, 283 U. S. 123.

Dated this 9th day of August, 1943.

Respectfully submitted,

JOSEPH J. DANIELS,
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Attorneys for Appellants, International Harvester Company and International Harvester Company of America.

APPENDIX A.

IN THE SUPREME COURT OF THE STATE OF INDIANA, NOVEMBER TERM, 1942.

On the 19th day of March, 1943, being the — Judicial day of said November Term, 1942.

No. 27,767

Hon. Frank N. Richman, Chief Justice; Hon. H. Nathan Swaim, Hon. Michael L. Fansler, Hon. Curtis G. Shake, Hon. Mart J. O'Malley, Associate Judges.

In the Case of DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON and FRANK G. THOMPSON, as and Constituting the Department of Treasury of the State of Indiana,

vs.

INTERNATIONAL HARVESTER COMPANY and INTERNATIONAL HARVESTER COMPANY OF AMERICA.

APPEALED FROM THE MARION SUPERIOR COURT, ROOM THREE.

Come the parties by their attorneys, and the court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by SHAKE, J.

The appellees sued to recover Gross Income Taxes paid to the State of Indiana during the years 1935 and 1936. It was stipulated at the trial that judgment for any amount found due should be in favor of the appellee, International Harvester Company, and that, for the purposes of the case, the appellee should be considered as one party.

The evidence disclosed, without conflict, that the appellees were corporations organized under the laws of other States but authorized to do business in Indiana. They were engaged in the manufacture of farm implements and in the sale of their products both at wholesale and retail. Manufacturing establishments were maintained at Richmond

and Fort Wayne, and selling branches at Indianapolis, Terre Haute, Fort Wayne, and Evansville in this State. There were also numerous manufacturing plants and sales branches in adjoining States and elsewhere. Each branch served assigned territory and in several instances parts of Indiana were within the exclusive jurisdiction of branch offices located without the State.

The trial court determined the tax liability of the appellees under four factual situations, designated as Classes A, C, D and E. The nature of these transactions may be stated as follows:

Class A: Sales by branches located outside Indiana to dealers and users located in Indiana. These sales were made on orders solicited in Indiana by representatives of out-of-state branches, or upon mail orders sent from Indiana to out-of-state branches. The orders were accepted by the outside State branch offices and the purchase money paid to them. Without directions from the purchasers, the goods were shipped to them in Indiana from branches, warehouses, or factories located outside Indiana.

Class C: Sales by branches located outside Indiana to dealers and users residing in Indiana. The orders were solicited in Indiana and the customers took delivery to themselves at the factories in Indiana to save time and expense of shipping.

Class D: Sales by branches located in Indiana to dealers and users residing outside of Indiana, in which the customers came to Indiana and accepted delivery to themselves in this State.

Class E: Sales by branches located in Indiana to dealers and users residing in Indiana, in which the goods were shipped from points outside Indiana to customers in Indiana, pursuant to contracts so providing.

The court below found that the appellees were entitled to a refund of taxes paid upon A, C, and D transactions, but not for those under Class E. By properly assigned errors and cross-errors each of these findings is challenged.

Much of the briefs were devoted to the subject of the interstate attributes of the transactions. We consider these discussions beside the issues. Interstate commerce is not

to be exempted from this tax unless it is imposed in such a manner as to lead to the possibility of double or multiple burdens. The Supreme Court of the United States held in *J. D. Adams Mfg. Co.* v. *Storen* (1938), 304 U. S. 307, 82 L. Ed. 1365, 58 S. Ct. 913, 117 A. L. R. 429, that this tax could not be imposed upon a domestic corporation with its principal office and place of business in this State, for gross income derived from the sale of its products to customers in other States. The Court said that, "the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold, as well as those in which they are manufactured. Interstate commerce could thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids." In *Department of Treasury* v. *Allied Mills, Inc.* (1942), Ind., 42 N. E. (2d) 34, we interpreted the *Adams* case as meaning that the tax may be levied by the buyer's State regardless of the incidental interstate nature of the transaction. This view was sustained by the Supreme Court. *Allied Mills, Inc.* v. *Department of Treasury* (1943), — U. S. —, —, L. Ed. —, — S Ct. —.

Applying the above decisions to the case at bar, it seems clear that transactions under Classes C, D, and E are subject to our Gross Income Tax. Neither of these classes present a possibility of double taxation, since no other State could impose such a burden in view of the conclusions reached in the *J. D. Adams* case.

Class A presents a different problem. Section 2 of Ch. 50, Acts 1933, §64-2602, Burns' 1933, §15982, Baldwin's 1934, which was in force during 1935 and 1936, provided:

> "Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this State, or who derived gross income from sources within this state, * * *"

It was beyond the power of the treasury department to broaden the tax base established by this statute by administrative regulations. In *Department of Treasury* v. *Muessel* (1941), 218 Ind. 250, 254, 32 N. E. (2d) 596, this Court said:

> "Unless the transaction comes clearly within one of the provisions of this definition it cannot be taxed as gross income. It is a settled rule of statutory construction that statutes levying taxes are not to be extended by implications beyond the clear import of the language used, in order to enlarge their operation, so as to embrace transactions not specifically pointed out. In case of doubt such statutes are to be construed more strongly against the State and in favor of the citizen."

The appellants would have us construe the statute as exempting only income derived *entirely from activities* outside of Indiana. This would distort the clear import of the language employed and violate the rule stated above. Under Class A the orders upon which the goods were sold were accepted outside the confines of Indiana, and payment was made to branches in other States. There was no showing of a tax evasion. We cannot say that income so received by the appellees was "derived from sources within the State of Indiana." Perhaps we should call attention to the fact that §2 of the Gross Income Tax of 1933 has since been amended. Acts 1937, Ch. 117, §2, p. 604, §64-2602, Burns 1933 (Supp.), §15982, Baldwin's Supp. 1937.

The judgment is affirmed as to Class A and E transactions, and reversed as to Classes C and D. The Superior Court of Marion County, Room 3, will sustain the appellants' motion for a new trial and enter a judgment as indicated by this opinion. The costs are adjudged equally against the parties.